

ORIGINAL

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

FILED/ACCEPTED  
SEP 14 2007  
Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MB Docket No. 05-295  
Table of Allotments, )  
FM Broadcast Stations ) RM-11280  
(Cumberland, Kentucky; )  
Weber City, Glade Spring and )  
Marion, Virginia) )

TO: Honorable Marlene H. Dortch  
Secretary of the Commission

ATTN: Assistant Chief, Audio Division, Media Bureau

**SECOND SUPPLEMENT TO  
PETITION FOR RECONSIDERATION**

JBL Broadcasting, Inc., licensee of FM Broadcast Station WVEK-FM, Cumberland, Kentucky (JBL), hereby respectfully submits this Second Supplement to its pending Petition for Reconsideration in the above-entitled matter. A "Motion for Leave to File Supplement" is being simultaneously filed herewith. In support whereof, the following is shown:

1. The undersigned was contacted by FCC Media Bureau legal staff to provide two "amendments" to its showing in this docket.

2. First, this is to confirm that JBL will reimburse the permittee of FM Broadcast Station WFYE, Glade Spring, Virginia, FCC Facility ID # 166082 (ASRadio, LLC), for its

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reasonable expenses in changing channels in accordance with the FCC's policy stated in FM Table of Assignments, **Circleville, Ohio et al**, 8 FCC 2d 159 (1967). On information and belief, installation of this station has not yet begun.

2. Likewise, JBL will will reimburse the licensee of FM Broadcast Station WOLD-FM, Marion, Virginia, FCC Facility ID # 19477, for its reasonable expenses in "changing" channels from Channel 263 to Channel 273 in accordance with the FCC's policy stated in FM Table of Assignments, **Circleville, Ohio et al**, 8 FCC 2d 159 (1967). The Commission should be aware that, despite the rulemaking in MM Docket No. allocating Channel 274 to Glade Spring, Virginia and ordering WOLD-FM to move from Channel 273 to Channel 263, WOLD-FM has never left Channel 273 and continues to operate on that channel as of today. Therefore, it would appear that the only costs that would be involved with WOLD-FM would be the cost of preparing and filing such applications as the FCC will require to re-license WOLD-FM on Channel 273, for which JBL will reimburse the licensee of WOLD-FM (Emerald Sound, Inc.).

3. Second, the Commission's staff asked JBL to make a showing as to whether under 47 CFR §1.429(b) the Commission can consider "changed circumstances" which have occurred

after the period for filing a petition for reconsideration has run.

4. Section 1.429(b) states as follows:

(b) A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances:

- (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;
- (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
- (3) The Commission determines that consideration of the facts relied on is required in the public interest.

5. In the instant case, the changed circumstances--the amendments to the two Shawsville, Virginia FM applications which were found by the FCC to be short-spaced to WOLD-FM's operation on Channel 273A which made them fully-spaced--occurred after the expiration of the petition for reconsideration period in this docket, and were certainly unknown to the petitioner until they took place in July of 2007.

6. While we could not find a reported case exactly on all fours with the instant fact pattern (pro or con), it appears that in the past the Commission has permitted a cure to procedural defects which apparently took place "out of time". See **FM Table of Allotments, Lincoln, MO et al**, 17 FCC Rcd 6119 (2002), citing **FM Table of Allotments, Canton,**

**IL et al**, 3 FCC Rcd 5824 (Bureau, 1988). Paragraph 14 of the **Lincoln** decision states as follows:

We do recognize, however, that in a few other cases involving FM or television allotment proposals or pleadings filed before October 4, 1990, the Commission has waived the verification rule, accepting the absence or late submission of verification. These cases, however, are distinguishable from the instant case. First, in Canton, Farmington, Elmwood, and Pekin, IL, 3 FCC Rcd 5824 (Policy and Rules Div. 1988), a cure to an unverified counterproposal was accepted since the cured proposal would provide a first local broadcast service to a community. We believe that the Canton case is distinguishable from the instant case because, even though the Commission did not expressly discuss it, there was no actual prejudice caused by acceptance of the subsequent cure to the unverified proposal. Rather, the conflicts to two other proposals were removed due to the availability of an alternate channel and the occurrence of changed circumstances.<sup>[FN16]</sup> Further, the Canton case triggers one of the higher FM allotment priorities and thereby provides stronger public interest benefits than the present case.<sup>[FN17]</sup> Specifically, the proposal in the Canton case triggered Priority 3, a first local transmission service. By way of contrast, both Twenty-One Sound and KYLC's proposals trigger the catch-all priority of "other public interest matters" (Priority Four) and provide enhanced secondary service. [footnotes omitted]

7. Further, the Commission has recently indicated in a **Report and Order in WT Docket 03-66**, 21 FCC Rcd 5606, ¶58 (2006) that, where faced with a Section 1.429 "Petition for Reconsideration",

Even if we were to determine that those petitions were procedurally flawed under Section 1.429(b)(1) and (2) of our rules, the importance of ensuring proper spectral management and spectral efficiency warrants our review of the substance of the petitions pursuant to Section 1.429(b)(3).

8. Additionally, we would note that the statutory authority for Section 1.429 is Section 405 of the Communications Act, as amended, 47 U.S.C. §405. Section 405 is also the authority for the rule that governs most other petitions for reconsideration at the Commission, Section 1.106 of the Rules (we would note that Section 1.106(b) and

(c) is virtually identical to Section 1.429). JBL believes that the following language from the Commission's *en banc* decision in **Lebanon Broadcasting Co., Inc.**, 68 FCC 2d 822 (1978), which involved a construction permit application (rather than an FM channel allocation proceeding), provides all the precedent needed to consider the changed circumstances caused by the Shawsville amendments and to grant the Petition for Reconsideration and the Petition for Rulemaking:

Risner's argument that the supplement is untimely is specious. The supplement does not purport to amplify the petition for reconsideration, but, in consonance with Section 1.106(c)(1) of our Rules, brings to our attention an event which occurred subsequent to our action dismissing the application. That event brings the application into full conformity with our Rules. **No time limit is specified in the rules for such a presentation.** Certainly Risner is not prejudiced by the delay. It is undisputed that we can, pursuant to Section 1.106(c)(3) of the Rules and Section 405 of the Communications Act, in our discretion, grant reconsideration if sufficient reasons are made to appear. Risner has cited no authority for its position that any part of Section 1.106 of the Rules may be inconsistent with Section 405 of the Communications Act. In fact, the courts have had numerous occasions to consider the relationship of that section of the Rules and Section 405 of the Act and have not found them hostile. See, for example, *Home Box Office, Inc. v. Federal Communications Commission*, U.S. App. D.C., Case No. 75-1280, decided March 25, 1977. We found that Lebanon was qualified to be a licensee except for the cross-ownership problem. The applicant has now done that which needed to be done in order to bring itself into full compliance with the rules. **We think that reconsideration is warranted not on the basis of the matters alleged in the original petition for reconsideration, but, rather, on the basis of a wholly new situation resulting from a subsequent event.** See *Eastern Broadcasting Company*, 55 FCC 2d 276, 34 RR 2d 1503 (1975). We are convinced that the new situation requires reconsideration and, in our discretion, we grant it. [emphasis supplied]

9. **Lebanon** states two salient points. First, there is no time limit specified in the Commission's rules cutting off consideration of changed circumstances, either in Section 1.106 or in Section 1.429; certainly, the statute

(Section 405) doesn't specify a time limit for changed circumstances. Second, reconsideration can be warranted "on the basis of a wholly new situation" arising from changed circumstances after the petition has been filed, even though different arguments may have been made in the petition.

10. JBL has observed Commission procedures and has filed a Motion for Leave to File Supplement, which stands unopposed.

11. Moreover, there is ample authority under Section 1.429(b)(3) for the Commission to consider the Supplement and grant both the Petition for Reconsideration and Petition for Rulemaking. There are at least three significant public interest justifications present in this matter:


- First, should JBL's rulemaking proposal be adopted, Weber City, Virginia will receive its first local aural broadcast service, one of the four statutory mandates of 47 U.S.C. §307(b);
- Second, WOLD-FM, Marion, Virginia, which on information and belief has operated on 102.5 MHz, Channel 273, since 1968, will not have to change channels, and will be able to continue to broadcast on 102.5 MHz, thereby preserving the goodwill that its licensee, Emerald Sound, Inc., has built up, and also avoiding confusion among the listening public in Marion and surrounding areas in southwest Virginia
- Third, the permittee of WFYE(FM), Glade Spring, Virginia, will be spared the obligation to pay a significant sum of money to reimburse WOLD-FM for the cost of changing channels from Channel 273 to Channel 263.

12. We would also point out that no party would be prejudiced by a grant of relief in favor of JBL, in that station WFYE has not started broadcasting yet, and the change of WFYE's channel assignment from Channel 274 to Channel 263 will not cause public confusion. In fact, a grant of JBL's proposal will further "proper spectral management and spectral efficiency", a public interest standard pointed out by the Commission in **WT Docket 03-66**, *supra*.

**WHEREFORE**, JBL Broadcasting, Inc. urges that this Second Supplement **BE ACCEPTED** and that its Petition for Reconsideration **BE GRANTED**, that its Petition for Rulemaking **BE GRANTED**, that Channel 274 **BE REALLOTTED** from Cumberland, Kentucky to Weber City, Virginia and upgraded to Class C3 status, and that the changes to the FM Table of Allotments at Glade Spring and Marion, Virginia proposed herein **BE ALLOWED**.

Respectfully submitted,

**JBL BROADCASTING, INC.**

By   
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Its Attorney

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September 14, 2007



**CERTIFICATE OF SERVICE**

It is hereby certified that true copies of the foregoing "Second Supplement, etc." was served by first-class United States mail, postage prepaid, on this 14<sup>th</sup> day of September, 2007 upon the following:

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